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No. 89-1566

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

VIRGINIA M. SEJMAN, A. R. TRAUTWEIN, THOMAS J. MCHUGH, JR., GLENDA IDLE, ROY G. COOK, JOSEPH D. DUBUQUE, ROBERT C. REESE, JOE L. NORMAN, MORRIS LEISTER, MARY J. MILLER, RAYMOND G. BERNHARDT, and LEWIS LATHREN,

Petitioners,

—v.—

WARNER-LAMBERT COMPANY, INC.,

Respondent.

THOMAS H. GIVENS, M. L. BRANNON, JOHN J. CAPUTO, and C.E. ROBINSON, JR.,

Petitioners,

—v.—

WARNER-LAMBERT COMPANY, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly sustained Warner-Lambert Company's denial of severance pay, in accordance with the language and purpose of its severance policy and consistent with uniform past practice, to individuals who had last been employed by Warner-Lambert more than three years earlier, who based their claims to severance pay upon actions taken by their new employer without Warner-Lambert's knowledge or participation, and most of whom had not even lost their jobs.

2. Whether the court of appeals was correct to reject the petitioners' claim of a vested, contractual right to severance pay purportedly established by a 1983 case decided under South Carolina common law, in light of the contingent and unaccrued nature of severance benefits under the Employee Retirement Income Security Act ("ERISA") and in view of ERISA's sweeping preemption provision.

PARTIES TO THE PROCEEDING

All parties to this proceeding are identified in the caption.[1]

1 Warner-Lambert's list of parent companies and subsidiaries (except wholly owned subsidiaries), required by Rule 29.1 of this Court, has already been filed with the Clerk.

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WARNER-LAMBERT COMPANY, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Respondent Warner-Lambert Company opposes granting the petition for a writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Fourth Circuit entered in these cases on November 24, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at 889 F.2d 1346 (4th Cir. 1989). The Order of the District Court for the District of South Carolina granting summary judgment in favor of Warner-Lambert is unreported. An earlier opinion of the Court of Appeals for the Fourth Circuit in these cases is reported at 845 F.2d 66 (4th Cir. 1988).

JURISDICTION

Discretionary jurisdiction to review the judgment of the Court of Appeals for the Fourth Circuit, entered on November 24, 1989, rests on 28 U.S.C. § 1254(1). A petition for rehearing and a suggestion for rehearing *en banc* were denied on January 5, 1990. Warner-Lambert's time to submit its brief in opposition to the petition for a writ of certiorari was extended to July 5, 1990.

STATUTE INVOLVED

This case involves the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* Of particular relevance are its provisions exempting employee welfare benefit plans, such as severance benefit plans, from the statute's stringent accrual, vesting, and funding requirements, 29 U.S.C. §§ 1051, 1081, and providing for broad preemption of "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a).

STATEMENT OF THE CASE

In these cases, sixteen individuals, who have not been employed by Warner-Lambert since January 1982 and most of whom have not even lost their jobs, seek to recover hundreds of thousands of dollars of severance benefits from Warner-Lambert because of actions taken by their new

employer. The court of appeals rejected the petitioners' claims that they had a vested, continuing right to severance pay from Warner-Lambert and found that they must instead look to their new employer for any severance benefits.

A. Factual Background

On January 20, 1982, Warner-Lambert sold its Medical-Surgical Division as a going concern to Professional Medical Products, Inc. ("PMP"). Following the sale to PMP, the employees in the Medical-Surgical Division, including the petitioners here, continued to work without interruption in the same jobs, at the same location, with the same seniority, at the same or higher salary, and with fully comparable employee benefits.

Notwithstanding that there had been no interruption in their employment, eleven employees of the Medical-Surgical Division, including six of the sixteen petitioners here, brought suit against Warner-Lambert, claiming a right to severance pay as a result of the sale. Relying exclusively on a breach of contract theory, they alleged that, even though they continued to work in the same jobs, they had been terminated as a result of job elimination by virtue of the sale and thus were entitled to severance pay under Warner-Lambert's 1981 severance policy.[2]

Following a trial, the district court found in favor of the plaintiffs and made severance pay awards to them ranging from a low of $23,796.40 to a high of $58,625.98. On appeal, the Court of Appeals for the Fourth Circuit reversed. The Fourth Circuit, exercising diversity jurisdiction, held, as a matter of South Carolina common law, that the plaintiffs had not been terminated by reason of job elimination within the meaning of the Warner-Lambert severance policy and dis-

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2 Warner-Lambert's 1981 severance policy provided in relevant part:

> Purpose: To assure fair treatment to an employee terminated by the Company as a result of job elimination, work performance or other reasons of Company convenience except for violation of company rules or regulations . . . .

missed their claims as premature. *Livernois v. Warner-Lambert Co.*, 723 F.2d 1148, 1156-57 (4th Cir. 1983). The court of appeals went on to interpret Warner-Lambert's severance policy as implicitly imposing on Warner-Lambert future liability for severance payments in the event that PMP terminated an employee for other than just cause and failed to satisfy the severance pay obligation. *Livernois*, 723 F.2d at 1157.

The petitioners in the Givens case worked for PMP for more than three years following the divestiture. In 1985, each of the four of them was terminated by PMP and allegedly received less severance pay from PMP than they would have been entitled to under Warner-Lambert's 1981 severance policy. Notwithstanding that the Givens petitioners had not worked for Warner-Lambert for more than three years when they were let go by PMP and that Warner-Lambert had no role in or control over their terminations, they claim entitlement to a total of almost $200,000 in additional severance benefits from Warner-Lambert.

The petitioners in *Sejman*, on the other hand, have not, to this day, been terminated by PMP. All of them have remained employed by PMP from the date of the sale up to the present time, with the single exception of petitioner Glenda Idle who voluntarily retired from PMP during 1985 and is receiving retirement benefits. In an apparent effort to supplement their ongoing salary or retirement payments from PMP with severance payments from Warner-Lambert, the Sejman petitioners contend that, effective February 1, 1985, when PMP revised its severance policy to provide reduced benefits in certain circumstances, they experienced job elimination within the meaning of the Warner-Lambert severance policy. They claim entitlement to more than $400,000 in severance benefits. Indeed, even petitioner Idle, who completed her working life at PMP and is now in voluntary retirement, maintains that she is owed $53,227 in severance benefits by Warner-Lambert.

B. Prior Proceedings

In mid-1985, the Givens and Sejman petitioners commenced actions in the United States District Court for the District of South Carolina to recover severance benefits allegedly due to them under Warner-Lambert's severance policy. Their claims were asserted under both the South Carolina common law of contracts and ERISA. The petitioners based their claims of entitlement to severance pay upon the Fourth Circuit's decision in *Livernois v. Warner-Lambert Co.*, 723 F.2d 1148 (4th Cir. 1983).

Following the completion of discovery, Warner-Lambert moved for summary judgment in both cases on the grounds that the common law breach of contract claims had been preempted by ERISA and that Warner-Lambert's denial of severance benefits was neither arbitrary nor capricious as a matter of law and thus could not support a claim under ERISA. The district court denied the motions in an Order dated February 5, 1987.

Although the district court recognized that "The scope of ERISA is unquestionably broad and generally it would preempt breach of contract claims founded upon state law principles," it nonetheless held that the petitioners' breach of contract claims were not preempted by ERISA and that the cases would be governed by the Fourth Circuit's decision in *Livernois*. The district court reasoned that "The law of the case doctrine dictates that Warner-Lambert be bound by the *Livernois* solution." In light of that holding, the district court did not reach Warner-Lambert's arguments under ERISA.

On appeal, the Fourth Circuit rejected *Livernois* as the determinative authority in the cases and held instead that the standards provided in ERISA were preemptive and should be applied in weighing the petitioners' claims to severance pay. *Sejman v. Warner-Lambert Co.*, 845 F.2d 66, 70 (4th Cir. 1988) ("*Sejman I*"). Consequently, the matter was remanded to the district court for a determination whether, considering "the totality of the circumstances," Warner-Lambert's denial

of severance benefits was "arbitrary or capricious." *Sejman I*, 845 F.2d at 70.

On remand, the district court granted Warner-Lambert's renewed motion for summary judgment, finding that its denial of severance benefits to the petitioners was not arbitrary or capricious. In reaching that conclusion, the district court focused, in particular, on the petitioners' "clear" ineligibility for severance benefits under the "plain language" of Warner-Lambert's severance policy; Warner-Lambert's adherence to its consistent past practice in connection with more than fifty-five divestitures over the course of thirty years; and the "windfall" nature of the recovery which the petitioners were seeking to obtain.

The Fourth Circuit affirmed the judgment of the district court that the petitioners had no entitlement to severance benefits from Warner-Lambert.[3] *Sejman v. Warner-Lambert Co.*, 889 F.2d 1346 (4th Cir. 1989) ("*Sejman II*"). Acknowledging at the outset that this Court's intervening decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), required review of Warner-Lambert's denial of severance pay under the *de novo* standard rather than the arbitrary and capricious standard, the court of appeals found it "clear that Warner-Lambert's action was justifiable under the *de novo* standard." *Sejman II*, 889 F.2d at 1348.

Relying on the contingent and unaccrued nature of severance benefits under ERISA, the Fourth Circuit rejected the petitioners' claims that *Livernois*, 723 F.2d 1148, gave them a vested contract right to severance pay from Warner-Lambert. *Sejman II*, 889 F.2d at 1348-49. The court of appeals then proceeded to review the language and purpose of Warner-Lambert's severance policy, its past practice under the severance policy, and the "windfall recovery" which would result from a finding for the petitioners, all of which led to the conclusion that the petitioners were not entitled to severance

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3 The affirmance was unanimous with respect to the Sejman petitioners, but there was a dissent with respect to the Givens petitioners.

benefits from Warner-Lambert. *Sejman II*, 889 F.2d at 1349-50.

In conclusion, the Fourth Circuit stated:

> To hold Warner-Lambert liable in this case would do violence both to Supreme Court and circuit precedent. It would be inconsistent with the character of severance pay plans as described by this circuit in *Sutton* [v. *Weirton Steel*], 724 F.2d at 410, with the principles of federal preemption of state contract law under ERISA as enunciated by the Supreme Court, *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987), *see also Shaw v. Delta Air Lines*, 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983), and with the controlling effect accorded ERISA by *Sejman* in this very case. These principles point to one conclusion. Most plaintiffs here have or will recover severance pay at an appropriate time, but it is to the policy of their present employer that they must look.

Sejman II, 889 F.2d at 1350. A petition for rehearing and a suggestion for rehearing *en banc* were denied on January 5, 1990.

REASONS FOR DENYING THE WRIT

I

THE UNIQUE BACKGROUND OF THE CASES MAKES REVIEW UNWARRANTED

As the Fourth Circuit noted, "this litigation has pursued a long and tortuous course" which "began when the governing principles of federal preemption and benefit plan administration were less clear than they are today." *Sejman II*, 889 F.2d at 1350. Due to their anomalous background, the cases have no significance except to the parties and will affect no other present or future litigants.

No other employees will be in a position to look to *Livernois*, 723 F.2d 1148, as a potential source of rights and no

other employers will face the *Livernois* decision as an historic fact to be dealt with in their severance plan administration under ERISA. This Court should not squander its discretionary jurisdiction on cases, such as these, which lack either widespread impact or national importance.

II

THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH ANY DECISION OF ANOTHER COURT OF APPEALS

In the past decade, most of the courts of appeals have had occasion to consider the availability of severance pay under ERISA in the context of a sale of a division as a going concern. Irrespective of which circuit these cases proceeded in, their outcome was determined by reference to a uniform set of considerations, including the language and purpose of the particular severance policy at issue and the existence and effect of any noncompliance with the procedural requirements of ERISA by the particular employer involved.

The decisions rendered varied from case to case depending on how the several factors weighed in each individual case, but the legal analysis was consistent. *Compare Harris v. Pullman Standard, Inc.*, 809 F.2d 1495 (11th Cir. 1987), and *Blau v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1984), *cert. denied*, 474 U.S. 865 (1985) (refusing to uphold a denial of severance benefits following a divestiture) *with Simmons v. Diamond Shamrock Corp.*, 844 F.2d 517 (8th Cir. 1988); *Schwartz v. Newsweek, Inc.*, 827 F.2d 879 (2d Cir. 1987); *Adcock v. Firestone Tire & Rubber Co.*, 822 F.2d 623 (6th Cir. 1987); *Holland v. Burlington Indus.*, 772 F.2d 1140 (4th Cir. 1985), *aff'd mem. sub nom. Brooks* v. *Burlington Indus.*, 477 U.S. 901 (1986) and *cert. denied*, 477 U.S. 903 (1986): *Anderson v. Ciba-Geiby Corp.*, 759 F.2d 1518 (11th Cir.), *cert. denied*, 474 U.S. 995 (1985); *Jung v. FMC Corp.*, 755 F.2d 708 (9th Cir. 1985); and *Sly v. P.R. Mallory & Co.*,

712 F.2d 1209 (7th Cir. 1983) (upholding a denial of severance benefits following a divestiture).

The petitioners confuse differences in result due to factual disparities with a true conflict between the courts of appeals. Admittedly, the Eleventh Circuit in *Harris v. Pullman Standard, Inc.*, 809 F.2d 1495, reached a different conclusion about the propriety of a denial of severance benefits following a divestiture than the Fourth Circuit did in these cases, but both courts considered the same factors in making their determinations. In both cases, the court of appeals considered the language and intent of the severance policy, past practice under the plan, and the seriousness of violations of ERISA's procedural requirements. Each case turned on its unique facts. There is no single, invariable interpretation which must be given to severance policies in every case. The so-called conflict in the circuits cited by the petitioners is thus adequately explained by the truism that different facts may well yield different results.

III

THE COURT OF APPEALS PROPERLY APPLIED ERISA STANDARDS IN WEIGHING THE CLAIM FOR SEVERANCE PAY

In arguing that the Fourth Circuit misused ERISA to deprive them of "vested contract rights" promised to them in *Livernois*, 723 F.2d 1148, the petitioners overlook the contingent nature of severance benefits under ERISA and ignore the existence of ERISA's sweeping preemption provision.

1. Contingent Nature of Severance Benefits

Under ERISA, employee welfare benefits, such as severance pay, are contingent, unaccrued, and unfunded benefits which can be unilaterally amended or even eliminated by an employer at any time. *See* 29 U.S.C. §§ 1051, 1081. Consequently, employees have no vested right to these benefits, and employers have no continuing duty to provide them. Con-

gress expressly exempted such benefits from the stringent vesting requirements applicable to retirement and pension benefits because it believed that the "vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans . . . ." H.R. Rep. No. 807, 93d Cong., 2d Sess. 60, *reprinted in* 1974 U.S. Code Cong. & Admin. News 4890, 4935 (1975).

The Fourth Circuit thus acted in accordance with the governing policies of ERISA in rejecting the petitioners' claim that they acquired "vested contract rights" to severance pay which survived their separation from Warner-Lambert. *Sejman II*, 889 F.2d at 1348-49. To have held otherwise would have thwarted Congress' intent of exempting employee welfare benefit plans from vesting requirements and from the attendant administrative burden and expense. If the petitioners' argument had been accepted, companies would be faced, after the sale of a division or subsidiary, with the impossible burden of monitoring the future careers of all their former employees in order to determine when and why they might eventually leave the successor employer. The court of appeals found that:

> Requiring such an ongoing obligation for severance payments after employees are employed elsewhere could discourage employers like Warner-Lambert from seeking to ensure that their former employees retain their old positions or encourage such employers to forego severance payments altogether.

Sejman II, 889 F.2d at 1349. *Cf. Ft. Halifax Packing Co. v. Coyne*, 482 U.S. 1, 13 (1987) ("Faced with the difficulty or impossibility of structuring administrative practices according to a set of uniform guidelines, an employer may decide to reduce benefits or simply not to pay them at all.")

2. Preemption

The sweeping preemption provided for in ERISA of "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" expressly includes preemption

of "all laws, *decisions*, rules, regulations, or other State actions having the effect of law, of any State. 29 U.S.C. § 1144 (emphasis added). Decisional law, such as *Livernois*, 723 F.2d 1148, which purports to regulate the payment of severance benefits under State common law principles, has thus been preempted by ERISA and cannot serve as the basis for resolution of a dispute over entitlement to benefits. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 48 n.1 (1987).

In refusing to recognize *Livernois* as the determinative authority which the petitioners urged it should be in deciding their entitlement to severance pay from Warner-Lambert, the Fourth Circuit gave proper effect to the preemption provision of ERISA. *Sejman II*, 889 F.2d at 1350.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Dated: July 5, 1990

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